FILED
OCT 31 2002
OFFICE OF THE CLERK

No. 02-287

IN THE

Supreme Court of the United States

OCTOBER TERM, 2002

HENRY LEE HUNT,

Petitioner,

—*v.*—

R.C. LEE,
Warden, Central Prison, Raleigh, North Carolina,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION

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REPLY TO BRIEF IN OPPOSITION

The State of North Carolina seeks to execute petitioner despite his appointed trial counsel's woeful abdication of their duty to present any defense on his behalf at sentencing. Had petitioner been convicted within the Seventh Circuit rather than the Fourth Circuit, his counsel's numerous egregious failures would prevent his execution absent a new sentencing hearing. In its Brief in Opposition, the State attempts to avoid this circuit split by alleging two minor factual differences between this case and the Seventh Circuit's decision in *Hall* v. *Washington*, 106 F.3d 742 (7th Cir. 1997)—but comparison of this case to *Hall* weighs in favor of granting certiorari. The State also erroneously asserts that petitioner's counsel briefly mentioning his name twice during closing argument satisfies this Court's requirement that counsel's sentencing presentation inform the jury of the defendant's individual circumstances. That assertion is equally unfounded.

The State also seeks to execute petitioner despite its refusal to disclose to petitioner's counsel various documents that were inconsistent with the State's theory of the case, in violation of *Brady* v. *Arizona*, 373 U.S. 83 (1963). In responding to petitioner's *Brady* claim, the State adopts an overly narrow definition of "evidence favorable to an accused" and flatly ignores the requirement that impeachment evidence be disclosed.

Argument

I.

The State Does Not Dispute That the Legal Principles Applied in This Case and in the Seventh Circuit's *Hall* v. *Washington* Decision Differ.

The State cannot and does not dispute that the Fourth Circuit's holding in this case conflicts with that of the Seventh Circuit in *Hall*. Instead, the State offers a pair of illusory factual distinctions. The State argues, first, that counsel in *Hall* did not refer in closing to the defendant's individual circumstances, as counsel did here, and, second, that the defendant's animosity toward counsel in *Hall* prevented a constitutionally effective investigation of potential mitigating circumstances. (BIO at 13.) In fact, however, the Seventh Circuit's opinion makes clear that counsel in *Hall* did refer to the defendant's individual circumstances in closing and that counsel offered mitigating evidence at sentencing, which is something petitioner's counsel utterly failed to do. *See Hall*, 106 F.3d at 750. The State's attempt to distinguish the two cases by highlighting minor factual differences thus backfires: As demonstrated below, counsel's performance in *Hall* compares favorably to counsel's performance here.

The State does not dispute that the Seventh Circuit ruled in *Hall* that, to provide constitutionally effective representation at capital sentencing, "counsel must present an argument that focuses the sentencer's attention" on "'the character and record of the individual offender and the circumstances of the particular offense.'" *Id.* at 750 (quoting *Woodson* v. *North Carolina*, 428 U.S. 280, 304 (1976)). Nor does the State dispute that, as in *Hall*, counsel here focused their sentencing presentation almost entirely on generalized moral and religious arguments, not on any facts about the defendant or the circumstances of the case. *Cf. id.* Nor does the State dispute that, as in *Hall*, counsel here declined to rely "on the specific weighing of aggravating and mitigating circumstances" (57a). *Cf. Hall*, 106 F.3d at 747. Finally, the State does not dispute that counsel here, as in *Hall*, relied primarily on arguments categorically opposing the death penalty, asserting that only God could rightly impose a death sentence, and condemning capital punishment as inconsistent with the fundamental tenets of Christianity (63a-65a, 67a, 71a). *Cf. Hall*, 106 F.3d at 747.

Instead, the State attempts to distinguish *Hall* from the instant case by asserting, first, that while counsel here "did reference [petitioner's] individual facts," counsel for Hall did not do so; and, second, that Hall refused to cooperate with his counsel and thus prevented an adequate investigation of potential mitigating circumstances, while counsel here engaged in such an investigation. (BIO at 13.) The former assertion is demonstrably false. As to the latter, the Seventh Circuit ruled that counsel's relationship with the defendant was irrelevant to the court's decision, and in any event, counsel in *Hall* at least put on a case in mitigation, unlike counsel here.

The State's attempt to distinguish this case from *Hall* based on counsel's fleeting references to petitioner—

naming him twice and saying he has a family, hardly a circumstance unique to petitioner—ignores the attempt by Hall's counsel to rely on similar references, only to be rebuffed by the Seventh Circuit. *See Hall*, 106 F.3d at 750. The Seventh Circuit rejected counsel's "mention of Hall's particular character and history" on the ground that it "was pure boilerplate that could have been said of the majority of capital defendants." *Id.* That rejection should apply with equal force here. The transcript of the closing argument by petitioner's counsel comprises 333 lines of text, and yet the State can point to only three sentences that even nominally refer to petitioner's individual circumstances: (i) that petitioner had a family; (ii) that petitioner had no say in his sentencing; and (iii) that petitioner's prior convictions did not demonstrate that he used violence against any person. (BIO at 12; *see* 63a-64a.)

These statements cannot bear the weight the State places on them. If the simple statements that petitioner "has a family" and that he has no say in his sentencing are not "pure boilerplate that could have been said of the majority of capital defendants," then nothing is. With regard to the third point, petitioner's counsel conceded that the court would instruct the jury as to that very fact. (64a.) Such glancing allusions to petitioner do not distinguish this case from *Hall*. To the contrary, they only reinforce the similarity between petitioner's case and *Hall*.

In any event, the State's attempt to demonstrate that *Hall* involved representation less individualized than the representation petitioner received must fail: Counsel in *Hall* not only offered up boilerplate references to the defendant's individual circumstances—counsel there also introduced mitigating evidence by putting on two witnesses. *See* 106 F.3d at 747. Petitioner's counsel introduced *no* mitigating evidence.

The State also argues that this case differs from *Hall* because the failure of Hall's counsel to present a fuller case in mitigation was the result of counsel's "horrible" relationship with Hall, which prevented a thorough investigation into potential mitigating circumstances. (BIO at 13.) Although the State labels this "[t]he most glaring distinction between *Hall* and the case at bar" (*id.*), the Seventh Circuit ruled that Hall's relationship with his counsel had no effect on counsel's performance at sentencing. *See Hall*, 106 F.3d at 751. Moreover, despite the State's claims to the contrary, counsel in *Hall* could not have eschewed *all* investigation of mitigating circumstances, given that they put on two witnesses at sentencing. Just as counsel in *Hall* declined to engage in a sufficient investigation of potential mitigating circumstances, so too counsel here interviewed only a few potential witnesses and failed inexplicably to pursue many promising leads. Here, however, unlike in *Hall*, counsel failed to put on *any* case in mitigation.

Finally, the State does not dispute that constitutionally effective assistance of counsel requires the presentation of a defense at sentencing that is individualized to the defendant's circumstances. Instead, the State offers the novel argument that because petitioner and his family allegedly engaged in a pattern of witness intimidation, and because petitioner had allegedly alienated many (but not all) of the potential witnesses on his behalf (after all, many of them appeared at the hearing in state court on petitioner's motion for appropriate relief), petitioner had effectively waived his right to an individualized defense. (BIO at 7-12.) Such an argument was explicitly rejected in *Hall*. *See Hall*, 106 F.3d at 751 (rejecting "a hint . . . that Hall waived the right to effective assistance of counsel through his own misconduct"). The Seventh Circuit ruled that "[w]hile Hall was certainly not an ideal client, counsel were still required to provide constitutionally adequate representation until such time as the court excused them."

Id. The State's spurious reliance on an alleged implicit waiver of the effective assistance of counsel required by the Sixth Amendment serves only to emphasize the similarity of the two cases.

II.

Counsel's Boilerplate References to the Defendant Do Not Satisfy This Court's Requirement That a Capital Defendant's Individual Circumstances Be Presented to the Jury.

The State does not dispute that petitioner's trial counsel presented no case in mitigation, or that they relied almost entirely on moral and religious arguments against the death penalty. Nor does the State dispute that petitioner's trial counsel failed to argue that petitioner's specific circumstances were insufficient to warrant execution. Finally, the State does not dispute that petitioner was prejudiced by his counsel's deficient performance, because the submission to the jury of even a single mitigating circumstance would have entitled petitioner to a new sentencing hearing under the standard this Court found to be constitutionally mandated in *McKoy* v. *North Carolina*, 494 U.S. 433 (1990).

Instead, the State argues that counsel's passing references to petitioner, boilerplate though they were, were sufficient to present petitioner's individual circumstances to the jury. (BIO at 17-19.) But from the entire sentencing phase of trial, the only references to petitioner's individual circumstances are counsel's assertions that petitioner "has a family" and that his prior convictions did not evidence the use of violence against any person (again, a fact that counsel conceded the judge would have pointed out to the jury anyway). (*Id.* at 18.) It is absurd to contend—as the State does here—that these two naked references, standing

alone, are sufficient to satisfy counsel's "constitutionally indispensable" role of providing the jury with a defense at sentencing that gives "consideration [to] the character and record of the individual offender and the circumstances of the particular offense." *Woodson*, 428 U.S. at 304. Nor do these two boilerplate references to petitioner ensure that his sentence is "directly related to the personal culpability of the defendant" and "a reasoned moral response to the defendant's background, character, and crime." *Penry* v. *Lynaugh*, 492 U.S. 302, 319, 327 (1989).

The State further argues that by appealing to general moral and religious themes, counsel was focusing the jury on Issue Four of the jury form, which asked whether the aggravating circumstances were sufficiently substantial to justify execution. (BIO at 17.) The State then points out that petitioner does not dispute that "this Court's precedent would not prevent a jury from considering mercy or sympathy *rooted in the mitigating evidence*." (*Id.* at 18 (citing *Gregg* v. *Georgia*, 428 U.S. 153 (1976)) (emphasis added).) Even a cursory examination of counsel's closing argument reveals, however, that the "mercy and sympathy" counsel urged in this case were *not* "rooted in the mitigating evidence" (because counsel had presented none), and thus were plainly outside the realm of permissible jury considerations.

III.

The State Provides No Support for the Overly Narrow Construction of "Evidence Favorable to an Accused" that Was Adopted by the Fourth Circuit.

The State does not dispute that its theory as to why petitioner allegedly killed Larry Jones was that Jones was telling the police of petitioner's purported involvement in Jackie Ransom's murder. The State also does not dispute

that it did not disclose to petitioner the officers' notes of their conversations with Larry Jones or that those handwritten notes were destroyed, in one case after petitioner requested their production. The State further does not dispute that it was aware of the inconsistency between the officers' notes and the impression the prosecution sought to convey to the jury, and that the State therefore should be held to a high standard of materiality. Finally, the State does not dispute that the officers' notes would have been useful in impeaching Bernice Cummings' misleading testimony.

Instead, the State urges that its production obligations are limited to evidence that is itself exculpatory. (BIO at 20.) This position is demonstrably at odds with *Brady* and its progeny. The State's restrictive view of its obligations under *Brady* is perhaps clearest when it argues that the suppressed notes are "either inculpatory or neutral." (*Id.* at 21.) It is simply impossible that the evidence in question—notes indicating that the victim had never identified petitioner as involved with the previous murder—could be considered "inculpatory." The State would limit its production obligations to evidence that conclusively exculpates a defendant—but *Brady* and its progeny dictate that the prosecution must disclose all evidence that is "favorable to an accused," *see Brady*, 373 U.S. at 87. Favorable evidence is not limited to evidence that conclusively establishes a defendant's innocence.

Finally, neither the Fourth Circuit nor the State disputes that the withheld evidence would have been useful in impeaching Bernice Cummings' testimony. By refusing to recognize the violation of petitioner's rights that resulted from this nondisclosure of important impeachment evidence, the State ignores *Bagley*'s instruction that "[i]mpeachment evidence . . . falls within the *Brady* rule." *United States* v. *Bagley*, 473 U.S. 667, 676 (1985).

CONCLUSION

The Court should grant a writ of certiorari to the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,

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